

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Malachi Paving & Grading, Inc.

Case No. 17-0344-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE DIRECTOR OF INDUSTRIAL
RELATIONS**

Affected contractor Malachi Paving & Grading, Inc. (Malachi) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work known as 2015 Pavement Rehabilitation Project (Project) performed for the City of Richmond (City), County of Alameda. On September 14, 2017, DLSE served the Assessment on Malachi. The Assessment determined that \$48,300.00 was due in statutory penalties under Labor Code section 1776.¹

Pursuant to written notice, a Hearing on the Merits was held in Oakland, California on March 6, 2018, before Hearing Officer Claire Ervin Lee. Evan Adams appeared for DLSE. John Riley, Malachi's General Manager, Danielle Riley, Malachi's Chief Executive Officer, and Vernon Goins II, Esq. all appeared on behalf of Malachi.²

The sole issue in this case is whether Malachi employed workers on the Project such that it was required to keep accurate payroll records and produce them on request to DLSE.

¹ All further statutory references are to the California Labor Code, unless otherwise indicated.

² John Riley acted as representative for Malachi until the lunch break at about 12:10 p.m., at which time he stated that he would not be returning. When the parties reconvened at about 1:10 p.m., Danielle Riley stated that she had called an attorney, Goins, and he would be arriving by 2:00 p.m. When he had not arrived by that time, Ms. Riley stated that she was prepared to go forward with the hearing as Malachi's representative, which she did. Goins arrived at about 3:15 p.m. and submitted his hand written notice of appearance on behalf of Malachi.

The Director of Industrial Relations finds that Malachi failed to carry its burden of proving the basis for the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment.

FACTS

The facts stated below are based on Stipulations by the parties, Exhibits 1 through 10 submitted by DLSE, other documents in the Hearing Officer's file, and the testimonies of Tawfic Halaby, Danny Labrador, Luis Martinez and Kay Tsen.

Stipulations:

The parties stipulated as follows:

1. The work subject to the Civil Wage and Penalty Assessment was performed on a public works and required compliance with California Prevailing Wage Law, Labor Code sections 1720 through 1816.³
2. On April 13, 2016, DLSE requested certified payroll records from Malachi Paving & Grading, Inc. in regards to work performed by employees of Malachi Paving & Grading, Inc. on the City of Richmond's 2015 Pavement Rehabilitation Project.
3. On May 5, 2016, DLSE submitted a second request for certified payroll records to Malachi Paving & Grading, Inc. on the City of Richmond's 2015 Pavement Rehabilitation Project.
4. Malachi Paving & Grading, Inc. did not produce certified payroll records in response to DLSE's requests.
5. On September 14, 2017, DLSE served a Civil Wage and Penalty Assessment on Malachi Paving & Grading, Inc. for \$48,300.00, reflecting penalties pursuant to Labor Code section 1776 at \$100 per day for 483 days.⁴

³ At a pre-hearing conference on January 8, 2018, the parties stipulated that the work subject to the Assessment was performed on a public works and required compliance with California Prevailing Wage Law, sections 1720 through 1816. At the Hearing on the Merits, Mr. Riley withdrew that stipulation. In its closing brief, however, Malachi admitted that the Project was a public work.

⁴ It is unclear exactly how DLSE calculated the number of days for which the \$100 per day penalty is due. May 5, 2016 (the date of the second request by DLSE to Malachi for certified payroll records) to September 14, 2017 (the date DLSE served the Civil Wage and Penalty Assessment), is 497 days, and the time period between April 13, 2016 (the date of the first request) to September 14, 2017 is obviously even longer. However, the parties stipulated to the 483-day penalty period, and that length is accepted. Under the statute, the \$100 per-day penalty commences on the

6. On October 5, 2017, Malachi Paving & Grading, Inc. timely filed a Request for Review.
7. Malachi Paving & Grading, Inc. requested DLSE's enforcement file. DLSE produced the enforcement file in a timely fashion.
8. No deposit was made with the Department of Industrial Relations as a result of the Civil Wage and Penalty Assessment.

The Assessment.

On or about April 28, 2015, the City advertised the Project for bid. It hired Granite Rock Company (Granite Rock) as the prime contractor, and The Hanna Group as project manager for the City. Granite Rock hired Malachi as a subcontractor to adjust utilities on the Project. Malachi performed work on the Project from September 20, 2015, until mid-December 2015 and submitted invoices to Granite Rock dated November 30, 2015, and December 31, 2015, for \$3,725.00, and \$6,550.00, respectively. The invoices described work that was consistent with the work specified for Malachi on Granite Rock's List of Subcontractors submitted as part of its bid for the Project.

Tawfic Halaby, Senior Civil Engineer for the City, submitted a complaint to DLSE dated February 25, 2016, alleging that Malachi had refused to submit Certified Payroll Records (CPRs) for work performed on the Project.

Kay Tsen, Deputy Labor Commissioner, investigated the complaint. On April 13, 2016, Tsen sent Malachi a request for payroll records (First Request). The First Request referred to section 1776 as authority for payroll records, described a ten working days' response time, warned of the \$100.00 per day per worker statutory penalty rate for failure to comply, and included DSLE forms under section 1776, subdivision (c) that Malachi could use for providing CPRs. In response, Danielle Riley submitted a letter dated May 8, 2016, stating that Malachi employed no workers on the Project, had no signed subcontract with Granite Rock to perform any work on the project, and had no payroll records to submit. On May 5, 2016, Tsen sent

eleventh day after the contractor's receipt of DLSE's request for certified payroll records (because the contractor has ten days within which to comply), and runs to the date of "strict compliance," or in this case, where no compliance ever occurred, to the date of the Assessment. (§ 1776, subd. (h).)

Malachi a form letter requesting payroll information (Second Request). The Second Request form letter stated “[t]his letter constitutes a formal request for public works payroll information as authorized by Section 1776 of the California Labor Code.” The letter further stated:

We also require certain additional ‘Payroll Records’ as that term is defined at Title 8 California Code of Regulations, Section 16000, including: All time cards, cancelled checks, cash receipts, trust fund forms, books, documents, schedules, forms, reports, receipts or other evidences which reflect job assignments, work schedules by days and hours and the disbursement by way of cash, check, or in whatever form or manner, of funds to a person(s) by job classification and/or skill pursuant to a public works project.

...

In addition to the payroll records, proof of form DAS 140 and 142 submissions and travel time and subsistence payments are also required.

In response, Ms. Riley submitted a letter dated May 19, 2016, stating that Malachi performed no work on the Project, and had no payroll records to submit.

Tsen requested and received documents from Granite Rock, including a copy of Malachi’s invoices. Malachi’s invoices specifically list items of work performed by Malachi and refer specifically by item number to those tasks specified for Malachi in the List of Subcontractors attached to the bid proposal.⁵

Halaby testified that the City requested, but did not receive CPRs from Granite Rock for work billed by Malachi, and therefore withheld progress payments. He recalled attending a meeting held at the offices of The Hanna Group, involving requests for CPRs from Malachi for work it had billed. John Riley, Halaby, Danny Labrador, the Project Manager for Granite Rock, and Nick Panayoutou, Vice President for The Hanna Group, also attended the meeting. At the meeting there was no resolution of the request for Malachi’s CPRs, and, according to Halaby, Riley stated that Malachi would no longer perform work on the Project. Labrador testified that he recalled that meeting and that after Riley stated that Malachi would no longer perform work

⁵ The items of work for which Malachi billed on November 30, 2015, are: bid item 26, Adjust gas valve to grade curb ramps; bid item 30, Adjust street light box to grade curb ramps; and bid item 71, Removal and Relocation of sign. Items for which Malachi billed on December 31, 2015, include: bid item 26, Adjust gas valve to grade-curb ramps; bid item 27, Adjust Fire Alarm Box to Grade (In Curb Ramp Area); bid item 30, Adjust street light box to grade curb ramps; bid item 68, Install sign and purchase of pole; and bid item 71, Removal and Relocation of sign.

on the Project, Granite Rock cancelled Malachi's contract and hired Vanguard Construction to finish Malachi's work.⁶

Tsen testified that since she never received CPRs, or any other payroll records, she was unable to perform an audit or interview any of Malachi's workers to verify how many had worked on the Project. She therefore issued the Assessment pursuant to section 1776, subdivision (h) for Malachi's failure to submit CPRs based on a penalty of \$100.00 per day for only one worker for 483 days.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a); see, too, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The format for reporting of payroll records requested pursuant to section 1776 shall be on a form provided by DLSE. (Cal. Code Regs., tit. 8, § 16401, subd. (a).) "Acceptance of any other format shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776." (*Id.*)

Moreover, "[a] contractor or subcontractor who pays less than the established prevailing rate may be assessed civil penalties (§§ 1741, 1775, and 1777.7), may be suspended from

⁶ Malachi erroneously states in its post hearing brief that John Riley testified that Malachi's subcontractor, Astro Construction, employed workers to complete Malachi's work on the Project. Riley did not testify at all. Malachi also argues that the Hearing Officer erred in allowing into evidence and considering "an unrelated and irrelevant administrative action by DLSE against Astro Construction." Malachi apparently contends that any evidence of participation by Astro Construction in the instant administrative action is either irrelevant or prejudicial. Malachi makes no showing of prejudice and, in any case, no such evidence was either admitted or considered.

bidding or working on public works projects for up to three years (§§ 1777.1 and 1777.7), and is also subject to criminal prosecution for failing to maintain payroll records demonstrating compliance. (§§ 1776 and 1777; *State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 296.)

Failure to Provide CPRs.

In this case, the evidence shows DLSE issued the Assessment pursuant to section 1776, subdivision (h) after Malachi failed to submit CPRs for at least ten days in response to a proper request from DLSE. The issuance of the Assessment was proper, as was the amount of the imposed penalty, \$100.00 per day for one worker for 483 days of non-compliance. Therefore, DLSE met its burden of coming forward with evidence that Malachi was properly served with the Assessment in accordance with the applicable rules (Cal. Code. Regs., tit. 8, § 17220, subd. (a) [hereafter, Rule 20], and §17250, subd. (a) [hereafter Rule 50].) The Assessment indicated the nature of the violation as failure to comply subsequent to receipt of a written notice to request for CPRs.⁷ DLSE having met its burden, Malachi had the burden of disproving the basis for the Assessment. (§ 1742, subd. (b).)

The quantum of proof required to establish the existence or non-existence of any fact is by a preponderance of the evidence. (Rule 50, subds. (b) and (d). Malachi's invoices submitted to Granite Rock are admissions that it performed work on the Project. Similarly, Mr. Riley's statement that Malachi would no longer perform work on the Project impliedly admits that, at some point, it performed work on the Project. Two of DLSE's witnesses, Halaby and Labrador, established that admission. Malachi called no witnesses to deny that it had performed work or that it had submitted invoices for the work performed. Therefore, Malachi failed to meet its burden of proving that the Assessment is not correct.

Malachi argues that DLSE abused its discretion by assessing the maximum penalty. The penalty assessed was correct given the evidence DLSE presented. Further, the amount of the penalty provided by the statute is mandatory: \$100.00 per calendar day of non-compliance per worker "until strict compliance is effectuated." (§ 1776, subd. (h).) Nothing in the statute

⁷ Malachi asserts that DLSE's investigation was lacking. A showing on the nature and extent of its investigation is not part of DLSE's prima facie case under Rule 20.

provides DLSE with discretion to reduce the penalty, and DLSE's only option was to assess based on one worker, since the evidence it had was that Malachi performed work on the Project and submitted invoices for its work. A reasonable inference is that the work must have been performed by at least one worker.

No Due Process Violation.

Malachi asserts but identifies no due process violation, and none appears on this record. Constitutional due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest. (U.S. Const., 5th and 14th Amends.; Cal. Const. art. 1, §§ 7, subd. (a) and 15; *Horn v. County of Ventura* (1979) 24 Cal. 3d 605, 612.) Due process "is not a technical conception with a fixed content unrelated to time, place and circumstances. (Citation omitted.) Due process is flexible and calls for such procedural protections as the particular situation demands." (*Mathews v. Eldridge* (1976) 424 U.S. 310, 335.) The degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of the administrative decision-making process from a due process standpoint. (*Id.*, at p. 341.)

Malachi evidently questions the statutory scheme that assigns to the Director the task of issuing decisions on requests for review of civil wage and penalty assessments while assigning to DLSE the task of issuing and enforcing those assessments. The regulatory framework for investigation, prosecution and adjudication of alleged violations of section 1776 establishes that (1) the investigatory and prosecutorial functions are conducted solely by the Labor Commissioner (as chief of DLSE, appointed by the Governor) through her designee pursuant to section 1741, subdivision (a), and (2) the adjudicatory function is conducted solely by the hearing officer and the Director pursuant to section 1742, subdivision (b). (§§ 79; 1741, subd. (a); and 1742, subd. (b).) Like the Labor Commissioner, the Director is appointed by the Governor. (§ 51.) Subdivision (a) of section 1742 provides that an affected contractor may seek review of an assessment, and subdivision (b) of section 1742 provides that the review will be conducted by the Director, who appoints an impartial hearing officer who is an employee of the Department of Industrial Relations, but not an employee of DLSE. Subdivision (a) of Rule 12 (Cal. Code Regs., tit 8, § 17212 subd.(a)) provides, with certain exceptions, that the

Administrative Adjudication Bill of Rights of the Administrative Procedures Act (APA) (Gov. Code § 11425.10 et seq.) applies to the Department's section 1742 hearings. Because DLSE is the enforcing agency that represents the prosecutorial function, and is separated from the hearing officer, who represents the adjudicative function, the procedures used in this matter comply with the APA. Moreover, Rule 7 (Cal. Code Regs., tit. 8, § 17207) specifies that any direct or indirect communication from DLSE and "any other party" regarding any issue in the proceeding are prohibited, without notice and opportunity for all to participate.⁸

Malachi argues that the hearing violates Government Code section 11425.30, which specifies that a hearing officer shall not be subject to the control of an "investigator, prosecutor, or advocate" in the matter. Here, the Hearing Officer does not function in any of these roles and is not subject to the control of DLSE, and Malachi offers no evidence or argument that suggests to the contrary. The Supreme Court has regularly ruled that a combination of investigative, prosecutorial and adjudicatory functions within a unitary agency does not, in and of itself, violate due process absent a showing that the internal separation of those functions has not been preserved. (See, e.g., *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731, 738 [*Morongo Band*].) The Supreme Court recognized there is a presumption of impartiality in these functions that can be overcome only under the following limited circumstances:

In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.

(*Morongo Band, supra*, at pp. 741-742.) Malachi does not contend that any participant in this process had any "financial or other personal interest." Malachi presents no evidence demonstrating actual bias or circumstances creating an unacceptable risk of bias. Nor has Malachi presented any evidence that the separation of investigatory, prosecutorial, and

⁸ Under Government Code section 11425.10, subdivision (a)(1), the person to whom the agency action is directed shall be given "notice and an opportunity to be heard, including the opportunity to present and rebut evidence" at the administrative hearing. Malachi presents no evidence to support any argument that it was not given such notice and opportunity.

adjudicative functions was not observed in order to overcome the presumption of impartiality under *Morongo Band*.

Malachi argues that it did not receive due process because the Hearing Officer failed to disclose early in the case that she participated in a hearing involving testimony concerning John Riley and Astro Construction.⁹ Malachi presents no evidence how the Hearing Officer participated other than being an observer in what was a public hearing. Malachi does not explain how observing another hearing could or did affect Malachi's right to due process in this proceeding. Astro Construction is among multiple subcontractors listed on Granite Rock's bid proposal, but is not a party to this administrative action. Riley himself raised the issue of his involvement in Astro Construction during his cross examination.

Also, although the Hearing Officer failed to swear Labrador and Lewis, at the beginning of their testimonies, she corrected that omission as soon as she realized her error, swore them in, and asked whether their prior testimony had been the truth. Both witnesses answered in the affirmative. As such, no due process violation arises by virtue of the hearing procedures utilized.

DLSE's Motion for Sanctions.

DLSE moved for monetary sanctions against Malachi pursuant to California Code of Regulations, section 17247, subdivision (b) for bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in section 128.5 of the Code of Civil Procedure. The factual bases for DLSE's motion stem from Malachi's failure to comply with prehearing orders issued by the Hearing Officer as to service on DLSE of exhibits, names of witnesses, and a list of issues before the Hearing on the Merits. The motion is also based on the on-going scheduling of the Hearing on the Merits.

DLSE's arguments are understandable, and Mr. Riley's behaviors may have resulted in delay, inconvenience and perhaps expense to the witnesses and DLSE. Mr. Riley, however, is not an attorney, and it cannot be concluded that his actions constituted bad faith tactics or merely

⁹ For training purposes, the Hearing Officer was an observer, not a participant, as to a portion of a hearing involving Messrs. Riley and Goins some time ago. Malachi concedes in its post hearing brief that the administrative action between DLSE and Astro Construction is unrelated and irrelevant to the instant case.

reflected lack of knowledge of appropriate steps to prepare for and participate in a hearing. DLSE's Motion for Sanctions is therefore denied.

FINDINGS

1. The Affected Contractor, Malachi Paving & Grading, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Malachi Paving & Grading, Inc. employed workers on the Project such that it was required to keep accurate payroll records and to produce them on request to DLSE.
3. On April 13, 2016, DLSE requested certified payroll records from Malachi Paving & Grading, Inc. in regards to work performed by employees of Malachi Paving and Grading, Inc. on the City of Richmond's 2015 Pavement Rehabilitation Project.
4. On May 5, 2016, DLSE submitted a second request for certified payroll records to Malachi Paving & Grading, Inc. on the City of Richmond's 2015 Pavement Rehabilitation Project.
5. Malachi Paving & Grading, Inc. failed to produce the requested payroll records at any time.
6. Malachi Paving & Grading, Inc. failed to show that the Assessment was incorrect.
7. DLSE properly assessed penalties against Malachi Paving & Grading, Inc. pursuant to Labor Code section 1776, subdivision (h) for its failure to provide the requested payroll records to DLSE.
8. In light of the findings above, Malachi Paving & Grading, Inc. is liable for penalties under Labor Code section 1776, subdivision (h) in the total amount of \$48,300.00.


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ORDER

The Civil Wage and Penalty Assessment is affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings, which shall be served with this Decision on the parties.

Dated: 5/17/18



André Schoorl
Acting Director of Industrial Relations